

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: July 6, 2005

TO : James J. McDermott, Regional Director
Region 31

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Pepperdine University 280-8220
Case 31-CA-27261 280-8660

This Section 8(a)(1) case was submitted for advice as to whether the Board has statutory jurisdiction over professors at Pepperdine University, a college affiliated with the Church of Christ.

We conclude that because the Church of Christ exercises control over the daily operation of the University, the University has a religious mission, and religious criteria are considered in the hiring and promotion of faculty, asserting jurisdiction here would create a significant risk of infringing on the rights guaranteed by the Religion Clauses of the First Amendment.

FACTS

The Charging Party alleges that Pepperdine University violated Section 8(a)(1) of the Act by intimidating, coercing, and harassing her to prevent her from utilizing the University's grievance procedure. The Region has deferred investigation of the merits until Advice determines whether the Board has jurisdiction.¹

Pepperdine University, located in Malibu, California, is affiliated with the Church of Christ. The Church of Christ is a congregational, as distinguished from a hierarchical, religious body; meaning that there is no structure or hierarchy beyond the individual congregation and each congregation is autonomous. There are 12 post-secondary educational institutions, including Pepperdine, that are affiliated with the Church of Christ.

Pepperdine was founded in 1937 by George Pepperdine, a lifelong member of the Church of Christ. In his founding speech George Pepperdine stated:

What we say here today in the dedication of these buildings is of very little importance, but the

¹ We thus do not consider whether the Charging Party was engaged in protected concerted activity.

work which will be done through the days and years and generations to come will be of very great importance if that work is guided by the hand of God. What I mean by the statement 'Guided by the Hand of God,' is that God's spirit working through His holy Word, the Bible, shall influence and control the lives of each and every member of the faculty to such an extent he will spread Christian influence among students.

The mission statement of Pepperdine University reads: "Pepperdine is a Christian university committed to the highest standards of academic excellence and Christian values, where students are strengthened for lives of purpose, service, and leadership." The mission statement of Seaver College, the undergraduate college of Pepperdine at which the Charging Party worked, states in part,

[Seaver College's] task is to prepare persons of diverse economic, social and ethnic backgrounds to become moral and intellectual leaders ... to accomplish this task, Seaver faculty members, administrators, and staff members serve as role models, both as professionals and human beings who are committed to excellence and motivated by personal faith in God. ... Seaver is a Christian college. As such it affirms in undergraduate and graduate programs that there are sources of truth deeper than those of secular culture: Moses, purveyor of divine laws; Amos, crying out for social justice and unfeigned piety; Paul, overwhelmed with both the reality of sin and the joy of forgiveness; and ultimately, Jesus of Nazareth, in whom God is uniquely revealed, and by whose death and resurrection all humankind can receive reconciliation with God. The study of religion and commitment to Christian beliefs regarding the origin, nature, and destiny of humanity permeates the curriculum. The college's ties to the Churches of Christ call it to a serious commitment to Biblical Christianity. Thus, in its mission, Seaver College seeks to remain true to the most profound insights of the religious movement which constitutes its heritage.

In addition to its mission statement, Pepperdine publishes an affirmation statement. The affirmation, which is incorporated into Seaver College's mission, is available on the University's website and in the student handbook. Pepperdine's affirmation reads:

Pepperdine University Affirms

That God is
That he is revealed uniquely in Christ
That the educational process may not, with
impunity, be divorced from the divine process
That the student, as a person of infinite dignity,
is the heart of the educational enterprise
That the quality of student life is a valid
concern of the University
That truth, having nothing to fear from
investigation, must be pursued relentlessly in
every discipline
That spiritual commitment, tolerating no excuse
for mediocrity, demands the highest standards of
academic excellence
That freedom, whether spiritual, intellectual, or
economic, is indivisible
That knowledge calls ultimately, for a life of
service.

According to Pepperdine's Amended and Restated Articles of Incorporation, the primary purpose of the Pepperdine University "is to operate for general educational purposes" The Second Amended and Restated Bylaws ("Bylaws") provide that all powers of the University "shall be exercised by or under the authority of ... the Board of Regents." This specifically includes the power to select and remove employees and to fix their compensation. The Bylaws require that 40 Regents sit on the Board. The Bylaws articulate that "in view of those distinctive characteristics of the University that are attributable to the relationship it enjoys with the Church of Christ, a majority of the actual number of regents serving shall be members of the Church of Christ." Similarly, the Bylaws require a majority of the members of the Executive Committee to be members of the Church of Christ. The Bylaws further require that the Chairman of the Board of Regents, who also serves as the Chairman of the Executive Committee, be a member of the Church of Christ.

The Board of Regents is responsible for appointing both the University President and Chancellor. The President has the primary responsibility for the administration of the University, subject to control by the Regents. The Bylaws require the President to be a member of the Church of Christ. Although not an explicit prerequisite, all Presidents have also been ordained ministers of the Church of Christ. There does not appear to be a requirement that the Chancellor, Chief Financial Officer, Vice President, or any Provosts be members of the Church of Christ.

The Bylaws also provide for a Religious Standards Committee, comprised of nine Regents, all of whom must be

members of the Church of Christ. This committee establishes and maintains "policies and practices of religion and spiritual life considered by the committee to be appropriate to ensure a continuing and meaningful relationship between the University and the Church of Christ." The Religious Standards Committee also establishes and maintains "religious and spiritual programs and guidelines of the University," including "setting the guidelines and standards concerning religious and moral practices and beliefs to be used in the selection and retention of students and members of administration, faculty and staff of the University." According to the President of Pepperdine, all faculty awarded tenure must be reviewed and approved by the Religious Standards Committee.

The Seaver College Rank, Tenure, and Promotion Handbook ("Tenure Handbook") sets forth policies designed to insure that all faculty are treated fairly with promotions in rank and tenure. The policies of the Tenure Handbook are required to be in harmony with the University Tenure Policy adopted by the Board of Regents. The Tenure Handbook delineates four critical areas in which tenure candidates are evaluated: teaching effectiveness; scholarly activity; service; and support for Christian values. Support for Christian values is defined as the candidate's consistent display of a pattern of support for generally accepted Christian values and the mission of Pepperdine University as described in the mission statement.

The application for employment at Pepperdine states that Pepperdine is religiously affiliated with the Churches of Christ and that Pepperdine has a right "to seek personnel who will support the goals of the institution, including the right to select members of the church to which the institution is related." The application continues, "in view [of Pepperdine's] commitment to a distinctive value system, prospective employees are requested to indicate a willingness to act in harmony with our purpose." The application offers illustrative examples, such as the fact that Pepperdine seeks to maintain a campus environment where the use of profanity and the consumption of alcoholic beverages or illegal substances are not acceptable. Near the signature line the application states, "the University expects from all its students and employees the highest standard of moral and ethical behavior in harmony with its Christian philosophy and purposes. Engaging in or promoting conduct or lifestyles inconsistent with traditional Christian values is not acceptable." There is a box for applicants to mark indicating their willingness to observe the policies of the university.

The Charging Party provided the Region with a copy of the letter offering her an Assistant Professor position at Pepperdine in 1999. The letter states, "[b]ecause Seaver College is anxious to foster a learning community within the context of Christian mission, the Dean's office will host two very special events that you will want to attend": a general orientation and a "proseminar on the integration of faith and learning... ." Additionally, the letter states, "[a]s you know, Pepperdine University has a strong Christian mission with a historic relationship with the Church of Christ. Because we assume that you support that mission and relationship and that you intend to become active in a local congregation of the Churches of Christ here in Southern California, we are especially hopeful that you will elect to join us... ."

Information posted on Pepperdine's website indicates in 2004, 21.8% of students expressed a religious preference for the Church of Christ. The American Association of University Professors Instructional Faculty Headcount indicates that in 2004, 33% of faculty expressed a religious preference for the Church of Christ. Additionally, the President of Pepperdine stated that all senior administrators are members of the Church of Christ.

Undergraduate students at Seaver College are required to take at least three Christian oriented religion courses. The courses required by Seaver are 1) the History of Religion of Israel; 2) The History of Religion of Early Christianity; and 3) Christianity and Culture. Students are also required to attend "convocations" each semester they attend Seaver College.² Convocation is a weekly gathering that provides opportunities for students to hear and discuss Christian perspectives on personal and contemporary issues, as well as providing avenues for Christian worship. Additionally, student conduct as described in the student handbook is guided by biblical considerations. The handbook states:

In keeping with Pepperdine University's Christian mission and its heritage with the Churches of Christ, all members of the University community are encouraged to consider and respect the teaching of Jesus and historic, biblical Christianity. It is expected that all students

² Convocation is also referred to as "convocation/chapel" on the Pepperdine website. Students are graded based upon convocation attendance. In any given semester, attendance at 14 or more convocations will earn the student an "A", while attendance at 7 or less will result in an "F".

will adhere to biblical teaching regarding moral and ethical practices. Engaging in or promoting conduct or lifestyles inconsistent with biblical teaching is not permitted.

ACTION

We conclude that because the Church of Christ exercises control over the daily operation of the University, the University has a religious mission, and religious criteria are considered in the hiring and promotion of faculty, asserting jurisdiction here would create a significant risk of infringing on the rights guaranteed by the Religion Clauses of the First Amendment. Accordingly, the charge should be dismissed, absent withdrawal, for lack of NLRA jurisdiction.

The Board does not have jurisdiction over lay teachers in church-operated schools.³ In Catholic Bishop, the Supreme Court found that such schools involved "substantial religious activity and purpose" and that the "substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid."⁴ Based on those concerns, the Court concluded that constitutional difficulties, i.e., a substantial risk of infringement to First Amendment rights, would result from Board jurisdiction over the relationship between church-operated schools and their teaching employees.⁵ For example, if a school administrator defended against an unfair labor practice charge by relying on the school's religious mission, the Board would be required to assess whether the administrator relied in good faith on religious doctrine.⁶ Failing to find a "clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board," the Court "decline[d] to construe the Act in

³ See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 506 (1979).

⁴ Id. at 503 (quoting Lemon v. Kurtzman, 403 U.S. 602, 616 (1971)).

⁵ Id. at 501-503.

⁶ Id. at 502. Additionally, the Board has found that the analysis announced in Catholic Bishop and applied in numerous subsequent Board cases adequately addresses any concerns arising under the Religious Freedom Restoration Act. See University of Great Falls, 331 NLRB 1663, 1665 (2000), enf. denied 278 F.3d 1335 (D.C. Cir. 2002).

a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."⁷

The Board decides on a case-by-case basis whether a religion-affiliated school has a "substantial religious character" so that asserting jurisdiction would raise a significant risk of violating First Amendment rights.⁸ In making this determination, the Board analyzes "the purpose of the employer's operations, the role of the unit employees in effectuating that purpose, and the potential effects if the Board exercised jurisdiction."⁹ The Board considers such factors as the "involvement of the religious institution in the daily operation of the school, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for the appointment and evaluation of faculty."¹⁰

Since deciding in 1986 that Catholic Bishop is to be applied on a case-by-case basis not only to elementary and secondary educational institutions, but also to post-secondary institutions,¹¹ the Board has utilized the foregoing factors in three cases to determine if the assertion of jurisdiction would infringe on First Amendment rights. The first case was St. Joseph's College, in which the Board refused to assert jurisdiction over a college founded by the Sisters of Mercy of Maine, a Catholic religious order.¹² The Board relied on the administrative control the order had over the college, given the college's financial dependence on the order and the requirement that members of the board of trustees could only come from the

⁷ Id. at 507.

⁸ University of Great Falls, 331 NLRB at 1664. See also Jewish Day School of Greater Washington, 283 NLRB 757, 761 (1987) (refusing to assert jurisdiction where employer's "purpose and function in substantial part [was] the propagation of a religious faith").

⁹ University of Great Falls, 331 NLRB at 1664; Jewish Day School of Greater Washington, 283 NLRB at 760.

¹⁰ Id. at 1664-65. See also Livingstone College, 286 NLRB 1308, 1310 (1987).

¹¹ See St. Joseph's College, 282 NLRB 65, 67-68 (1986); Livingstone College, 286 NLRB at 1309, n.4.

¹² 282 NLRB at 68.

order.¹³ The Board then emphasized the constraints placed on the faculty, who could not teach ideas contrary to Catholicism and who, at the time of hire, had to agree to promote the objectives of the order.¹⁴ Finally, the Board noted the role of the Catholic Bishop of Portland who could, among other things, have faculty members removed if their conduct was not in harmony with Catholic beliefs.¹⁵ In light of these facts, the Board held that asserting jurisdiction would present a significant risk of infringing on First Amendment rights.¹⁶

In another case, Livingstone College, the Board asserted jurisdiction over a college founded by the AME Zion Church.¹⁷ The Board first noted that the college was not financially dependent on the church, that only half the members of the board of trustees had to be church officials, and that the trustees were authorized to promulgate rules to ensure academic freedom.¹⁸ The Board then proceeded to attach particular importance to the fact that the college did not have a religious mission and that the faculty did not have to promote the church's teachings, but could teach ideas contrary to those of the church.¹⁹ In addition, the Board noted that faculty members could not be discharged for advocating ideas contrary to church beliefs.²⁰ Emphasizing the absence of both a religious mission and requirements that faculty conform to certain religious principles, the Board concluded that asserting jurisdiction would not raise First Amendment issues.²¹

In a third case, University of Great Falls, the Board asserted jurisdiction over a university founded by the Sisters of Providence, St. Ignatius Province.²² The Board

¹³ Id. at 68.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ 286 NLRB at 1308, 1310.

¹⁸ Id. at 1309.

¹⁹ Ibid.

²⁰ Id. at 1309-10.

²¹ Id. at 1310.

²² 331 NLRB at 1666.

noted that the university was not financially dependent on the order; the university's president and members of the board of trustees did not have to be Catholic; the trustees were not required to set policies consistent with Catholicism; and that members of the administration did not have to be Catholic.²³ Moreover, the faculty was not required to teach or support Catholic doctrine, the students were only required to take one course in religious studies that did not have to emphasize Catholicism, and the general curriculum did not emphasize or require an emphasis on Catholicism.²⁴ Based on these facts, the Board concluded that the university did not have a "substantial religious character," and held that asserting jurisdiction would not create the risk of violating First Amendment rights.²⁵

Applying the three factors which the Board considers to this case, we conclude that the Board should not assert jurisdiction over the University. Jurisdiction would not be appropriate because the Church of Christ exercises control over the daily operation of the University, the University has a religious mission, and religious criteria are considered in the appointment and evaluation of faculty.

First, there is a strong involvement of the Church of Christ in the operation of the University. The Bylaws require that a majority of the 40 Regents on the Board of Trustees, the body responsible for running the affairs and business of the University, be members of the Church of Christ. The Bylaws also require that a majority of board members on the Executive Committee be members of the Church of Christ. In addition, both the University President and Chairman of the Board must be members of the Church of Christ. Moreover, the current University President and all previous presidents have been ordained ministers of the Church of Christ. Currently, all senior administrators on campus are members of the Church of Christ as is 33% of the faculty. Lastly, the Religious Standards Committee, responsible for both ensuring a continuing relationship between the Church of Christ and the University and setting the standards concerning religious and moral practices and beliefs to be used in the selection and retention of students, administrators, faculty, and staff, must be composed entirely of members of the Church of Christ.

²³ Id. at 1665-66, fn. 7.

²⁴ Id. at 1665-66.

²⁵ Id. at 1666.

Second, the evidence indicates that the University seeks to fulfill a religious mission -- a serious commitment to biblical Christianity -- as demonstrated by George Pepperdine's speech, the University mission statement, the Seaver College mission statement, and the affirmation. And, in contrast to Livingstone College, Pepperdine's curriculum seeks to reinforce its religious mission. For example, students are not only required to take three Christian-oriented religion courses in their first year, but are also required to attend weekly convocation/chapel every semester they are enrolled at Seaver College. Additionally, student conduct is regulated in terms of adhering to biblical teachings in moral and ethical practices. Students are prohibited from engaging in conduct or lifestyles inconsistent with the Bible.

The University has also taken steps to ensure that the faculty does not undermine its religious mission. Like in St. Joseph's College, where the Board declined to assert jurisdiction, potential employees are made aware on the employment application that Pepperdine expects its employees to conform to the highest standards of moral and ethical behavior in harmony with its Christian philosophy and purpose. Specifically, "engaging or promoting conduct or lifestyles inconsistent with traditional Christian values is not acceptable." Pepperdine's adherence to an articulated religious mission and its insistence that faculty conform to Christian principles distinguishes both Livingstone College and University of Great Falls. Unlike those cases, where the Board found "the absence of a religious mission,"²⁶ or the lack of "a substantial religious character,"²⁷ the evidence here shows that the University actively seeks to promote and conform to its stated religious mission.

Third, religious criteria are considered in the hiring and promotion of faculty. While Pepperdine hires faculty from all religious backgrounds, it reserves the right to give preference to those who are members of the Church of Christ. To this end, the Charging Party testified that she was asked in her interview whether she was a member of the Church of Christ and, although she was, it still was made clear that she did not have to be a member to gain employment. Additionally, the University made known to the Charging Party its expectations that she should partake in religious activities outside the classroom by stating in her letter of hire, "we assume that you support [the

²⁶ 286 NLRB at 1309.

²⁷ 331 NLRB at 1666.

University's Christian mission] and intend to become active in a local congregation."

Most significantly, Pepperdine also uses religious criteria when promoting or granting tenure to faculty. The Tenure Handbook clearly articulated that one of four critical areas of assessment of a professor seeking promotion or tenure is "support for Christian values." "Support for Christian values" is demonstrated by displaying a consistent pattern of support for Christian values and the mission of Pepperdine University.

In sum, the Board should not exercise jurisdiction because the Church of Christ is involved in the operation of the University, Pepperdine has a religious mission, and religious criteria are used in hiring and promoting faculty. In light of this conclusion, the Region should dismiss the charge, absent withdrawal.²⁸

B.J.K.

²⁸ Because jurisdiction is inappropriate here under current Board law, we do not address the applicability of the three-part test adopted by the D.C. Circuit in University of Great Falls v. NLRB, 278 F.3d 1335, 1343, 1347 (D.C. Cir. 2002) (court would find no jurisdiction where institution holds itself out to public as religious institution, is nonprofit, and is religiously affiliated).